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NO. 88-218 (2)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

WAYNE PIERSON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

Whether no legal issue is raised since the Illinois Appellate Court specifically applied the four factors set forth in Brown v. Illinois for determining whether the taint from an illegal arrest has been attenuated in properly ruling that the taint of the illegal arrest was attenuated, and petitioner's subsequent statement was admissible.

Whether no legal issue is raised where the Appellate Court considered each prosecutorial comment now raised by petitioner as denying him due process, applied established Illinois precedent and properly concluded that the prosecutor's remarks did not serve to deprive petitioner of a fair trial.

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JURISDICTION

Petitioner seeks leave to invoke the jurisdiction of the Court pursuant to 28 U.S.C. sec. 1257(3). However petitioner, who raises only factual questions concerning the presence of factors attenuating the taint from an illegal arrest and the propriety of a few isolated prosecutorial remarks in closing argument, has failed to present grounds warranting a grant of certiorari.

STATEMENT OF THE CASE

Petitioner, Wayne Pierson, was charged with the murder and attempt armed robbery of Michael Samawi, the owner of a small grocery store located on the south side of Chicago, Illinois. Prior to trial, petitioner filed a motion to suppress his confession to the crimes, alleging that his statements were the product of an unlawful arrest, obtained in violation of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

Evidence adduced at the hearing on the motion revealed that police officers, acting on a tip received in an anonymous telephone call to the victim's nephew naming the petitioner, Alfie Jones and Antoine Hudson as having knowledge of the crime, went to the homes of petitioner and Alfie Jones and asked them to come to the police station for questioning. (Tr. 5, 80-81) The officers

went to defendant's house at approximately 2:00 p.m. (Tr. 6) The testimony of the State's witnesses and the defendant's witnesses differed as to what happened next. The police officers testified that when a woman answered the door, they asked for petitioner and the woman called for him. (Tr. 62) They further testified that they told the woman and petitioner that they were investigating a murder of a store-owner and wanted to question petitioner, whereupon petitioner accompanied the officers to an unmarked police car. (Tr. 63-66) Petitioner testified that he encountered the police officers as he was leaving the building, and they told him they were looking for him. (Tr. 166) Petitioner then went to his upstairs apartment with the officers, who sat on his grandmother's bed and told her that they wanted to talk to petitioner in the front room and once in the front room, petitioner was asked to go to the police car, which he did. (Tr. 168)

Once petitioner was in the car, the officers drove to the police station stopping to pick up another of the persons named in the telephone tip, Alfie Jones, and attempting to locate the third, Antoine Hudson. (Tr. 67-68) The group arrived at the police station at approximately 3:00 p.m. (Tr. 47, 88) Petitioner accompanied the police officers to an interview room where he remained alone and unhandcuffed for an hour while the officers interviewed Alfie Jones. (Tr. 73-74) Alfie Jones gave a detailed account of the shooting, stating that he saw petitioner shoot Michael Samawi and had discussed committing a robbery with petitioner prior to the shooting. (Tr. 14-16) Jones described the type of weapon used by petitioner; the time and date of the murder; the persons present; the actions of the deceased, an employee of the store who was present, and the petitioner; the number of shots fired; and the clothing worn by

petitioner. The police officers then compared Jones' statement with their police reports and found that the details were corroborated. (Tr. 36, 100, 101)

After the interview with Jones, police officers told petitioner he was under arrest and advised him of the Miranda warnings, as well as the fact that he could be tried and sentenced as an adult. (Tr. 14-16) Petitioner acknowledged that he understood each right and was then informed that he had been implicated by Alfie Jones. (Tr. 15, 73) Petitioner then made statements confessing to the murder. (Tr. 73-74, 370-385)

In ruling on the motion, the trial court stated that it did not believe the officers' testimony regarding what occurred at defendant's home but, instead, believed the defense witnesses. (Tr. 207) The court then held that the police had no probable cause for the initial arrest of defendant at

his home. (Tr. 207) Nonetheless, the trial court found that Alfie Jones' statement acted as an intervening factor giving police probable cause for defendant's lawful arrest at the police station, and hence, that defendant's statements were admissible. (Tr. 207)

At trial, the State presented the testimony of Robert Phillips, an employee of the store who was present when the owner was shot; the statements of petitioner; and ballistics evidence establishing that the gun borrowed by petitioner fired the bullets which killed the victim. Both sides argued to the jury, which returned verdicts finding petitioner guilty of murder and attempt armed robbery. (Tr. 525) Petitioner was sentenced to 28 years for murder in the Illinois Department of Corrections. (R. 534)

Petitioner then appealed his convictions to the Illinois Appellate Court, First District, arguing that the trial court

improperly denied his motion to suppress and that he was denied a fair trial as the result of certain allegedly inflammatory and improper remarks by the prosecutor during closing argument. The State initially maintained that petitioner voluntarily accompanied the officers to the station and was arrested only after Alfie Jones' statement had given the officers probable cause. The Appellate Court declined to consider this contention since it agreed with the State's alternate contention that the taint from the initial arrest was sufficiently attenuated at the time petitioner made his statement, applying the four factors set forth for determining attenuation in Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975): People v. Pierson, 166 Ill. App. 3d 558, 519 N.E.2d 1185 (1st Dist. 1988). The court further ruled that the prosecutor's remarks, considered either individually or

cumulatively, did not serve to deny the defendant a fair trial. (Pet. for Cert., App. 28-29) Petitioner's petition for rehearing in the Appellate Court was denied, as was his petition for leave to appeal to the Illinois Supreme Court.

REASONS FOR DENYING THE WRIT

I.

NO LEGAL ISSUE IS RAISED SINCE THE ILLINOIS APPELLATE COURT SPECIFICALLY APPLIED THE FOUR FACTORS SET FORTH IN BROWN V. ILLINOIS FOR DETERMINING WHETHER THE TAINT FROM AN ILLEGAL ARREST HAS BEEN ATTENUATED IN RULING THAT THE TAINT OF THE ILLEGAL ARREST WAS ATTENUATED AND PETITIONER'S SUBSEQUENT STATEMENT WAS ADMISSIBLE.

Petitioner asks that a writ of certiorari issue to review the Illinois Appellate Court's determination, under Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975), that the police misconduct in the instant case was not particularly flagrant, and further argues that the same court improperly applied a "per se" test for attenuation, allegedly finding that the illegality of petitioner's arrest was attenuated "per se" because of an intervening statement made by an eyewitness implicating petitioner. Since petitioner

concedes by his argument that the appellate court considered at least one other factor in addition to an intervening circumstance, namely, the mildness of the police misconduct in the instant case, petitioner's assertion that the appellate court incorrectly used a "per se" analysis must be viewed as a transparent attempt to convert a purely factual issue into a legal one.

Counsel for the State of Illinois, therefore, urge this Court to deny the writ since petitioner raises no legal issue. The Appellate Court specifically considered all four factors set forth in Brown v. Illinois, supra, for determining whether a confession has been purged of the taint of the illegal arrest, and properly determined that while the two hour time lapse was insufficient to purge the taint of the illegal arrest, the facts that (1) petitioner was given Miranda warnings; (2) the initial arrest was not accompanied by flagrant police misconduct;

and (3) most importantly, the probable cause to arrest supplied by an eyewitness' detailed and corroborated account of the crime implicating petitioner constituted an intervening circumstance; all served to attenuate the taint from the illegal arrest and petitioner's subsequent statement was therefore admissible. People v. Pierson, 166 Ill. App. 3d 558, 519 N.E.2d 1185 (1st Dist. 1988). Thus, the appellate court employed the appropriate legal standard in the instant case.

In drafting its opinion, the Illinois Appellate Court, explicitly citing to Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963), first correctly observed: "Where the State seeks to introduce a statement made by the defendant after an illegal arrest, it must establish that the statement was an exercise of the defendant's free will, independent of any taint of the illegal arrest." People v.

Pierson, 166 Ill. App. 3d 558, 563, 519 N.E.2d 1185 (1st Dist. 1988). The court then enumerated four factors for determining whether the taint from the primary illegality has been attenuated, explicitly relying on Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975): (1) the temporal proximity of the illegality to the evidence obtained; (2) the presence of intervening circumstances; (3) the purpose and flagrancy of the police misconduct, and (4) the presence or absence of Miranda warnings. Id. The analysis set forth in Brown has been repeatedly employed by this Court in discussing issues of attenuation. Taylor v. Alabama, 457 U.S. 691, 102 S.Ct. 2064, 73 L.Ed. 2d 314 (1982); Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed. 2d 222 (1985). Thus, it is abundantly clear that the appellate court was employing the correct standard of law in the instant case, and petitioner has failed to raise any issue of law.

Moreover, the appellate court also correctly analyzed the facts in light of the legal standards in the instant case. The court properly concluded that the time between petitioner's arrest at his home and his confession at the police station was too brief to attenuate the taint. See Brown v. Illinois, supra. The Court also properly concluded that application of the other three factors operated to attenuate the taint: petitioner received Miranda warnings; the police misconduct was not flagrant; and the probable cause provided by Alfie Jones' statement constituted an intervening circumstance.

Petitioner does not dispute that he received the Miranda warnings prior to making his statement. Rather, he disputes the appellate court's conclusion that the police misconduct was not flagrant, erroneously likening the instant case to Taylor v. Alabama, 457 U.S. 691, 102 S.Ct. 2064, 73

L.Ed. 2d 314 (1982). He further objects to the court's determination that Alfie Jones' detailed statement implicating petitioner constituted an intervening circumstance, asserting without any support in the record that the statement was obtained in violation of Alfie Jones' constitutional rights and the appellate court incorrectly applied a per se test. A brief examination of defendant's contentions reveals that they are meritless.

The appellate court's determination that the police officers' conduct was not flagrant finds ample support in the record. In light of the circumstances of this case, it is clear that the police acted in a reasonable fashion. Based on a tip that three individuals had knowledge of a serious crime, a senseless murder, they went to the homes of these individuals at a reasonable hour, 2:00 p.m., and asked then to come to the station for questioning. They spoke with petitioner's family and, although what was

said is in conflict, the family was aware they were police officers and that they wanted to talk to the defendant. The request to question petitioner at the police station was reasonable in light of the fact that the police had three individuals they planned to speak to and the fact that the individuals might be less likely to talk freely at home in front of their families. Thus, the police station was the most convenient and available location to conduct interviews. The police conduct at the police station was reasonable. Petitioner was asked to sit in an interview room; he was not booked, fingerprinted, handcuffed, or placed in a cell while the officers questioned Alfie Jones. Immediately after the conclusion of the interview with Jones, and having obtained probable cause, the officers advised petitioner that he was under arrest and read him the Miranda warnings.

As this Court has previously observed, "Unfortunately, the task of defining 'custody' is a slippery one and 'policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever.' [citation]" Oregon v. Elstad, 470 U.S. 298, 309, 105 S.Ct. 1285, 1292, 84 L.Ed. 2d 222 (1985). In the instant case, the officers' belief that petitioner was not in custody for the two hour period prior to their notification that he was under arrest was ruled to be erroneous, but their conduct could not fairly be described as "flagrant." A comparison with the police conduct in Taylor v. Alabama, supra, which was flagrant, only serves to underscore this conclusion. In Taylor, police officers went to petitioner's home and without probable cause, or a warrant, informed him that he was under arrest, searched him and took him to the police station, where he was given Miranda warnings, questioned several times,

fingerprinted and subjected to a lineup. 457 U.S. at 691. Clearly, the police conduct in the instant case was less egregious.

The appellate court likewise properly concluded that Alfie Jones' detailed and corroborated eyewitness statement implicating defendant acted as an intervening circumstance, giving the police probable cause to arrest petitioner at the police station. Petitioner's attacks on this determination by the court are also meritless. His bold assertion that Alfie Jones was illegally under arrest at the time he made his statement finds no support whatsoever in the record. Moreover, petitioner has no standing to complain of a violation of Jones' rights. Murphy v. Hunt, 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982); Burch v. Louisiana, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96, (1979); Poe v. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961). Finally, United States

v. Cherry, 759 F.2d 1196 (5th Cir. 1985) does not support defendant's argument that the Appellate Court improperly relied on the existence of an intervening circumstance but instead supports the court's ruling in the instant case. The subsequent Cherry decision, United States v. Cherry, 794 F.2d 201 (5th Cir. 1986), which petitioner fails to cite, provides even further support for the appellate court's opinion.

While the Fifth Circuit in the 1985 Cherry opinion did reject a rule that the intervening advent of probable cause would be per se sufficient to purge the taint of an illegal arrest, the court stated, "we think that the intervening acquisition of probable cause is an important attenuating factor in the analysis," and remanded the case to the district court for a determination of whether the defendant's consent to search was untainted by the prior illegal arrest. 759 F.2d 1212. The Fifth

Circuit subsequently upheld the district court's determination that defendant's consent to search was not tainted by his illegal arrest, after a consideration of the four factors set forth in Brown, supra. United States v. Cherry, 794 F.2d 201, 205-207 (5th Cir. 1986). In so ruling, the court observed, "The development of independently procured probable cause following an illegal arrest is a critical factor attenuating the taint of the initial legal arrest." 794 F.2d at 206. Thus, the rationale of Cherry is in full accord with the opinion of the Illinois Appellate Court in the instant case.

In conclusion, the appellate court properly applied the established law set forth by this Court in Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975), for determining whether the taint from an illegal arrest has been attenuated. The court then properly analyzed the facts of the instant case in light of the factors set

forth in Brown in concluding that the taint of petitioner's initial illegal arrest was attenuated by: (1) the fact that petitioner received Miranda warnings; (2) the fact that the police misconduct was not flagrant; and (3), by the advent of an intervening circumstance, Jones' detailed and corroborated statement implicating petitioner. Petitioner therefore has raised no issue of law, novel or otherwise, and his petition for a writ of certionari should be denied.

II.

NO LEGAL ISSUE IS RAISED WHERE THE ILLINOIS APPELLATE COURT CONSIDERED EACH PROSECUTORIAL COMMENT NOW RAISED BY PETITIONER AS DENYING HIM DUE PROCESS, APPLIED ESTABLISHED ILLINOIS PRECEDENT AND PROPERLY CONCLUDED THAT THE REMARKS DID NOT SERVE TO DEPRIVE PETITIONER OF A FAIR TRIAL.

Petitioner asserts that several comments made by the prosecutor denied him due process, and that the Appellate Court's determination to the contrary is erroneous. However, he cannot possibly meet his burden of showing that the comments require reversal of his conviction under Darden v. Wainwright, ___ U.S. ___, 106 S.Ct. 2464, 94 L.Ed. 2d (1986). In Darden, this Court established the standard for determining whether prosecutors' comments denied petitioner a fair trial, stating, "it is not enough that the prosecutor's remarks were undesirable or even universally condemned. [citation] The

relevant inquiry is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. [citation]"

A review of the Appellate Court's opinion in the instant case reveals that it considered each comment raised here by petitioner, applied established Illinois precedent and properly concluded that the comments, whether viewed individually or cumulatively, did not serve to deny defendant a fair trial. Regarding the remark that petitioner again claims had the effect of disparaging the presumption of innocence, the Appellate Court observed that the prosecutor corrected himself and properly informed the jury as to the law following a defense objection. People v. Pierson, 166 Ill. App. 3d 558, 519 N.E.2d 1185 (1st Dist. 1988). As to the isolated references to the victim's family, the court concluded that considered

in the context of the entire case, it was at most harmless error. The Appellate Court also noted that the prosecutor's remark that, "I am Michael Samawi for the purposes of this argument..." was clearly invited by defense counsel's argument that, "for the purpose of this trial I am Wayne Pierson...."

The Appellate Court properly resolved all of petitioner's claims concerning closing argument; again he raises no legal issue, novel or otherwise. The petition for a writ of certionari should be denied.

CONCLUSION

The People of the State of Illinois respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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